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Case No. ED CV 10-0786 JCG

MEMORANDUM OPINION AND ORDER

Defendant.

INTRODUCTION AND SUMMARY

On December 1, 2010, Defendant filed his answer, along with a certified copy of the administrative record. [Docket Nos. 15, 16.]

In sum, having carefully studied, *inter alia*, the parties' joint stipulation and the administrative record, the Court concludes that, as detailed below, there is

1 substantial evidence in the record, taken as a whole, to support the decision of the
2 Administrative Law Judge (“ALJ”). Thus, the Court affirms the Commissioner’s
3 decision denying benefits.

4 II.

5 **PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

6 Plaintiff, who was 47 years old on the date of his most recent administrative
7 hearing, has completed high school. (*See* Administrative Record (“AR”) at 22, 47,
8 48, 133, 165, 539.)

9 On January 9, 2007, Plaintiff filed for DIB and SSI, alleging that he has been
10 disabled since April 14, 2004 due to a left wrist injury, diabetes, hypertension, neck
11 and back pain, and poor vision. (*See* AR at 64, 71, 133, 138, 154, 159.)

12 On March 9, 2009, Plaintiff, represented by counsel, appeared and testified at
13 a hearing before an ALJ. (*See* AR at 44-59.) The ALJ continued the hearing due to
14 an incomplete record. (*Id.* at 57-58.)

15 On April 2, 2009, Plaintiff, represented by counsel, appeared and testified at a
16 second hearing before an ALJ. (*See* AR at 22-43.) The ALJ also heard testimony
17 from Arthur Lorber, M.D. and Samuel Landau, M.D., both medical experts (“ME”),
18 and Troy Scott, a vocational expert (“VE”). (*Id.*; *see also id.* at 11.)

19 On August 3, 2009, the ALJ denied Plaintiff’s request for benefits. (AR at 11-
20 21.) Applying the well-known five-step sequential evaluation process, the ALJ
21 found, at step one, that Plaintiff has not engaged in substantial gainful activity since
22 his alleged onset date. (*Id.* at 13.)

23 At step two, the ALJ found that Plaintiff suffers from severe impairments
24 consisting of “type II diabetes mellitus, injury to the left wrist, hypertension, cervical
25 and lumbar degenerative disc disease, and morbid obesity.” (AR at 13 (emphasis
26 omitted).)

27 At step three, the ALJ determined that the evidence did not demonstrate that
28 Plaintiff’s impairments, either individually or in combination, meet or medically

1 equaled the severity of any listing set forth in the Social Security regulations.^{1/} (AR
2 at 15.)

3 The ALJ then assessed Plaintiff's residual functional capacity^{2/} ("RFC") and
4 determined that he can perform light work. (AR at 15.) Specifically, the ALJ found
5 Plaintiff "is able to stand and walk for eight hours and sit for eight hours in an eight
6 hour day; only occasionally work overhead with the right upper extremity; not
7 perform power gripping with the left hand and only frequently grip with the right
8 hand; and only occasionally work above shoulder level." (*Id.* at 15-16 (emphasis
9 omitted).)

10 The ALJ found, at step four, that Plaintiff lacks the ability to perform his past
11 relevant work. (AR at 19.)

12 At step five, based on Plaintiff's RFC and the VE's testimony, the ALJ found
13 that "there are jobs that exist in significant numbers in the national economy that
14 [Plaintiff] can perform," including hand packer, packing machine operator, and
15 electronics assembler. (AR at 19-20.) Thus, the ALJ concluded that Plaintiff was
16 not suffering from a disability as defined by the Act. (*Id.* at 11, 20.)

17 Plaintiff filed a timely request for review of the ALJ's decision, which was
18 denied by the Appeals Council. (AR at 1-3, 132.) The ALJ's decision stands as the
19 final decision of the Commissioner.

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23 ^{1/} See 20 C.F.R. pt. 404, subpt. P, app. 1.

24 ^{2/} Residual functional capacity is what a claimant can still do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
26 n. 5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the
27 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's
28 residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

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1 V.

2 **DISCUSSION AND ANALYSIS**

3 A. Plaintiff's Credibility

4 Plaintiff argues that the "ALJ rejected [Plaintiff's] testimony on the ground
5 that [his] condition was so mild as represented on CT scans and MRIs that it should
6 not cause the extent of pain claimed. That is insufficient." (Joint Stip. at 5.)

7 Plaintiff also contends that the ALJ's rejection of his credibility based on
8 "conservative and routine care" and his daily activities are in error because the ALJ
9 "makes only conclusory statements." (Joint Stip. at 11-12.)

10 1. The ALJ Must Provide "Clear and Convincing" Reasons For
11 Discounting Plaintiff's Credibility

12 An ALJ can reject a plaintiff's subjective complaint upon (1) finding evidence
13 of malingering, or (2) expressing clear and convincing reasons for doing so. *Benton*
14 *v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider the
15 following factors in weighing a plaintiff's credibility: (1) his or her reputation for
16 truthfulness; (2) inconsistencies either in the plaintiff's testimony or between the
17 plaintiff's testimony and his or her conduct; (3) his or her daily activities; (4) his or
18 her work record; and (5) testimony from physicians and third parties concerning the
19 nature, severity, and effect of the symptoms of which she complains. *Thomas v.*
20 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002).

21 Here, the ALJ did not find evidence of malingering. (*See generally* AR at 11-
22 21.) Therefore, the ALJ's reasons for rejecting Plaintiff's credibility must rest on
23 clear and convincing reasons. *See Benton*, 331 F.3d at 1040.

24 2. The ALJ Properly Rejected Plaintiff's Subjective Complaints

25 The Court is persuaded that the ALJ provided clear and convincing reasons
26 for rejecting Plaintiff's credibility. Three reasons guide this determination.

27 First, the ALJ found that the objective medical evidence does not support
28 Plaintiff's alleged degree of disability. (AR at 16-17 ("findings are indicative that

1 [Plaintiff's] complaints are not fully substantiated by the objective medical
2 conclusions" and "his allegations of disabling pain are out of proportion with the
3 record").) Plaintiff cannot identify any objective evidence that supports his claims
4 of total disability. (*See generally* Joint Stip. at 3-5, 11-13.) Instead, a review of the
5 record demonstrates that the examining internist found that the "range of motion" of
6 Plaintiff's extremities, neck, and back were "normal." (AR at 348-53.) Similarly,
7 the examining psychiatrist determined that the mental status examination "revealed
8 no evidence of cognitive deficits, perceptual disturbances or delusional disorders."
9 (*Id.* at 362-65.) A lack of objective evidence supporting Plaintiff's symptoms cannot
10 be the sole reason for rejecting Plaintiff's testimony. *Rollins v. Massanari*, 261 F.3d
11 853, 856-57 (9th Cir. 2001). However, it can be one of several factors used in
12 evaluating the credibility of Plaintiff's subjective complaints. *Id.*

13 Second, the ALJ properly discounted Plaintiff's complaints regarding the
14 severity of his pain as inconsistent with a conservative treatment plan. (AR at 17
15 ("The record fails to document that [Plaintiff] has been hospitalized for his
16 impairment other than for his arthroscopy on his left wrist or show that [Plaintiff]
17 has received significant active care other than for conservative routine
18 maintenance.")); *see Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ
19 properly considered, as part of credibility evaluation, treating physician's failure to
20 prescribe, and claimant's failure to request, medical treatment commensurate with
21 the "supposedly excruciating" pain alleged, and the "minimal, conservative
22 treatment") (citation omitted); *Parra v. Astrue*, 481 F.3d 853, 750-51 (9th Cir. 2007)
23 ("We have previously indicated that evidence of 'conservative treatment' is
24 sufficient to discount a claimant's testimony regarding severity of an impairment.").
25 Substantial evidence supports this finding. For instance, Plaintiff was prescribed
26 physical therapy for his shoulder pain and tendonitis. (*See* AR at 302-03.)

27 Further, despite Plaintiff's assertions of debilitating pain, his treating
28 physician noted that he "has not attended one session of therapy and has No-Showed

1 to 3 consecutive [appointments].” (AR at 302-03) Nor has Plaintiff provided an
2 acceptable reason for not following a prescribed course of treatment. *See Bubion v.*
3 *Barnhart*, 224 Fed.Appx. 601, 604 (9th Cir. 2007) (ALJ properly discounted
4 plaintiff’s credibility based on failure to follow prescribed treatment of physical
5 therapy and plaintiff did not provide an acceptable reason for not following
6 prescribed course of treatment); *see also* 20 C.F.R. § 404.1530(c) (acceptable
7 reasons for failing to follow a prescribed course of treatment, *i.e.*, “specific medical
8 treatment is contrary to the established teaching and tenets of your religion”).

9 Third, the ALJ properly discounted Plaintiff’s subjective complaints as
10 inconsistent with his reported activities of daily living. (AR at 17 (ALJ found that
11 Plaintiff “has described daily activities which are not limited to the extent one would
12 expect, given the complaints of disabling symptoms and limitations. The overall
13 evidence suggests that [Plaintiff] has the ability to care for himself and maintain his
14 home[, and] the performance of [his] daily activities as described is not inconsistent
15 with the performance of many basic work activities.”)); *see Thomas*, 278 F.3d at
16 958-59 (inconsistency between the claimant’s testimony and the claimant’s conduct
17 supported rejection of the claimant’s credibility); *Verduzco v. Apfel*, 188 F.3d 1087,
18 1090 (9th Cir. 1999) (inconsistencies between claimant’s testimony and actions cited
19 as a clear and convincing reason for rejecting the claimant’s testimony).

20 Here, although Plaintiff testified that he has “pain in [his] feet,” hands,
21 “problems with [his] knees and hips . . . , lower back[, and] upper neck,” (AR at 50-
22 51), Plaintiff reported to the examining psychiatrist that he “helps out with
23 household chores and does shopping,” “enjoys spending time in his garage, and
24 working in his back yard” and “helps to care for his four children.” (*Id.* at 365; *see*
25 *also id.* at 180-81 (Plaintiff’s daily activities questionnaire indicating that he is able
26 to shop for groceries, walk half a mile to the store and back, and carry laundry), 313
27 (treatment note from Loma Linda Veterans Medical Center (“VAMC”), dated
28 November 3, 2006, indicating that Plaintiff “describes himself as highly intelligent

1 (172 IQ) and one who invents[, and] states ‘I like to do things with my hands[,’
2 however he] feels that he can not concentrate on functional activities currently due to
3 stress and diabetes”), 363 (Plaintiff reporting that he “does some household chores
4 and errands[,] works in a garage, and works in the back yard[, and] relaxes by
5 walking and watching television”), 485 (VAMC treatment note, dated October 31,
6 2007, indicating “Patient states that he walks for exercise”).^{3/}

7 Thus, the ALJ provided clear and convincing reasons supported by substantial
8 evidence for discounting Plaintiff’s subjective complaints of pain.

9 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
10 **AFFIRMING** the decision of the Commissioner denying benefits.

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13 Dated: April 26, 2011


14 Hon. Jay C. Gandhi
15 United States Magistrate Judge
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25 ^{3/} Plaintiff argues that the “fact that [he] is able to carry on some daily activities
26 does not detract from [his] credibility.” (*See* Joint Stip. at 12-13.) The Court does
27 not agree. The Court finds that Plaintiff’s domestic activities are a sufficient basis
28 on which to find him not credible. The Court will not “engage in second-guessing”
as substantial evidence supports the ALJ’s findings. *Thomas*, 278 F.3d at 959.